

THE LUXURY OF BEING THE LOSING LITIGANT

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This chapter might more appropriately be titled, "GOD Shines HIS Brightest Light on the Losing Litigant." It is probably fair to say when a person is involved in a civil litigation, they want to win. I present here the novel proposition that a person often gains more by losing, than by winning. In Montesquieu's historic work "Spirit of the Law" in the chapter, "On the Corruption of the Principles of the Three Governments," he writes:

"When I was rich I was obliged to pay court to slanderers, well aware that I was more likely to receive ill from them than to cause them any. . . . Since becoming poor, I have acquired authority; no one threatens me. . . . I used to pay a tax to the republic, today the republic feeds me; I no longer fear loss, I expect to acquire."³¹

Or as the singer Bob Dillon wrote, "When you ain't got nothing, you got nothing to lose."³²

For purposes of this article, when I apply the term "lose" or "win" to litigation, it refers to a case conclusively decided by a Court with no appeal pending. Thus, any litigation resolved by settlement is excluded.

When you lose, presumably the opposing side views itself as winning. In the immediate aftermath, the winner assumes justice has prevailed and experiences an initial euphoria. In contrast, the loser is dejected and feels a personal injustice has been done to them. This feeling is coupled with a loss of faith in the legal system.

For the most part, other than close friends and family, no one cares or worries about the loser. The winner tends to feel their interests have been adequately protected because the loser has been neutralized by the Court. As a result, in the early aftermath, generally the loser does not represent any further financial or ideological threat to the winner. A prudent winner will not engage in the infliction of further misfortune upon the loser. To do so, would be poor strategy. This is because it would raise substantial doubt in the minds of those who supported the winner regarding their true intentions. It would make them question whether the winner was really seeking justice as they purported in Court or alternatively just seeking to inflict harm upon someone else. It is a general characteristic of human nature that we admire benevolent and humble winners, who exhibit a sense of compassion for those they conquer. In contrast, we tend to hold in disdain winners who are perceived to be mean people. It is a

correspondingly similar trait of human nature that we tend to feel sorry for those who lose, even if we believe their loss was justified. This is attributable to the human emotion of compassion most people possess.

The foregoing principles lead to the premise that in most situations the loser of a civil litigation obtains the luxury of being left alone. In contrast, the winner bears the burden of having to be careful about the manner in which they conduct themselves after the win. So to a large extent, the loser gains in terms of personal freedom and the winner loses some freedom. This of course presupposes that just as the winner would be foolish to try and inflict further harm upon the loser, the loser must be sufficiently prudent to accept the immediate consequences of their loss.

Nevertheless, no one likes to lose. You would be hard-pressed to find someone who says, "I'm glad I lost, because I gained freedom." Undoubtedly, the first inclination of anyone who loses an important civil litigation, is to conceive of an action that will undo the injustice. In its basest terms, this is called "revenge." To embark on such a course however, in the immediate wake of the loss is an endeavor almost certainly doomed for failure.

The more prudent course for a person who has lost a case is to take maximum advantage of the "Luxury of Losing," it provides. This can encompass many different routes. The freedom from further attack by the winner that is generally provided to the loser who does not act precipitously gives rise to a "Luxury of Time" for the loser. The loser generally has an ample degree of time to determine the next course of action to be taken, if any. Whereas, the winner will be on guard for an immediate counter-attack, the level of caution dissipates as time passes. The more time passes, the less concern the winner has about any reprisal from the loser.

This does not mean the loser should use the element of time to simply plan a legal counter-attack. In fact, quite the reverse may be the case. Positively, the first course of conduct the loser should engage in is to assess the reasons giving rise to the loss. This mandates honest self-examination. Unfortunately, although this is the first course of conduct that should be taken by the loser, it really can't be successfully accomplished in the immediate aftermath of litigation. The emotions run too high immediately following the end of a case. These emotions preclude a fair and honest self-assessment. A sufficient passage of time is necessary for self-examination to be genuinely productive.

Proper self-examination requires the losing litigant to determine whether they were genuinely right or wrong in the positions taken during the case. We tend to believe we are correct in the heat of a moment. However, the dispassionate reflection required for true self-assessment may lead to a different conclusion. In most cases each party, each attorney and the trial court Judge are

rarely entirely right or wrong. To allow for such a preposterous presumption would mandate a correlative conclusion that humans can be perfect, which we cannot. The loser needs to isolate and reflect upon those aspects of the case where they were wrong and those where they were right. This analysis should be performed not only within the context of applying positive law, but also upon application of general moral principles.

Questions the loser should reflect upon include, but are not limited to the following. Each individual question below is essentially two questions, as it should be asked from both the perspective of positive law and also from the perspective of morality.

1. Should I have won the litigation?
2. Why did I lose the litigation? What specific individuals, groups of individuals or organizations were most responsible for my loss? Was I the one most responsible for the loss, or was it someone else or some other group of people?
3. What did I gain by losing the litigation? Are there other people who are aware I lost and was untreated unjustly? Does a degree of support now exist for me from those people? Are those people contemptuousness of those who won or those who assisted the winners?
4. What things did I do correctly and what things did I do wrong?
5. What things did the opposing party, their attorney, my attorney and the Judge do that were right, and similarly what did they do that was wrong?
6. How strong is my sense of injustice as to what occurred?
7. Should I launch a legal counterattack, and if so why? Against who should a legal counterattack be launched? What person or organization is really responsible for what occurred?
8. If I decide to launch a legal counterattack, what is my true purpose for doing so? Is it to vindicate my own case? Is it to achieve an overall social justice that will be helpful to others? Or is it just to immorally inflict harm through legal process upon the individuals that committed an injustice upon me?
9. Should I just accept the loss and move on and try to lead a good life?
10. What are the Risks/Rewards of launching a legal counterattack?
11. How do other individuals who were not involved in the litigation, but who were aware of its existence view the conduct of everyone involved?

12. If I do decide to launch a legal counterattack, what should be the nature of it? What type of preparation is necessary? How much time will it take to prepare? How do I avoid making the same errors I made in the litigation that I lost?

A losing litigant who decides to embark upon the risky business of launching a legal counterattack, needs to balance the degree to which they will be sacrificing other aspects of their life and future in order to proceed upon such a course. Once a losing litigant makes the decision to proceed with a legal counterattack in the future, they instantaneously lose the freedom gained by losing the litigation. Cause, effect and time are zero sum games. No matter what decision is made on any issue in life, something is gained by taking a chosen path and something is lost. Simply stated, by selecting one option, we foreclose the option of taking a different path. Thus, to a certain extent no matter what decision a person makes on any issue, it is simultaneously both the right and wrong decision. To make matters worse, declining to select any option is a choice in and of itself, because it leaves a person precisely where they are.

A losing litigant deciding to pursue legal action as a result of losing a case, and who does not act precipitously, generally has ample time and freedom to prepare. As stated, first they need to perform an extensive process of self-examination. The next step is learn everything possible within legal constraints about their opponents.

Everybody has strong points and vulnerable points. By researching matters quietly and legally, and without drawing attention to yourself, you can learn about both aspects of your opponent. Who supports them? Who are their political enemies? Ultimately, you may determine that your real opponent was not even the litigant you originally opposed in the case you lost. It may not even be the attorneys who were involved in the case or the trial court Judge who ruled against you. After careful research you may determine their conduct was nothing more than a product of an unfair system, which even they were victims of. If you reach that conclusion, basic principles of morality mandate that your legal counter-attack should focus on the system, rather than any individuals.

The converse of the rule that a losing litigant gains a "Luxury," by losing, is that a winning litigant becomes burdened by, a "Poverty of Winning." A person cannot win a case exclusively by their own efforts. Even a Pro Se litigant who wins, needs the Judge to rule in their favor. The mere fact that winning a case at trial requires a decision by the Judge in favor of the winner, or a jury decision in their favor, or is based upon judicial rulings that allowed for a jury verdict leading to victory, or is a result of zealous representation by an attorney, means that the winner comes out of the litigation with Moral Debt.

Not necessarily financial debt, but a more onerous liability. They owe their victory to the actions of other people. In contrast, the loser does not owe anybody anything. In fact, since other people may feel internally guilty about their contribution to an unjust victory, they may feel they owe something to the loser.

The Debt incurred by the winner is coupled with the knowledge that the loser may launch a legal counterattack, thereby jeopardizing the win. Consequently, whereas the loser gains freedom and time, the winner loses freedom and time. Prudent winners generally lack the freedom to pursue further matters against the loser, since there is a high probability others would view them as ungracious, mean winners. Freedom is also lost to the extent winners expend time and effort to protect against possible countermeasures by the loser.

Similar to the loser of a case, prudence mandates that the winner should also engage in a process of self-examination and analysis. However, unlike the loser, the winner generally lacks sufficient incentive to do so and most often does not. The loser will ponder the loss endlessly and therefore has the opportunity to develop his mental faculties as a result of the loss. In contrast, the winner will tend to simply adopt a perspective of, "Well, I won, so therefore I was right," and then just leave the matter at that. By such a perspective, the winner increases his vulnerability.

In conclusion, there is positively a "Luxury of Losing" associated with losing a civil case that maximizes the prospect for human development. There is also a "Poverty of Winning" associated with winning a case that diminishes the prospect of such development. The world and universe are filled with doctrines of opposites. We often gain more by losing and lose more by winning. If the goal of human existence is attainment of Freedom, it can fairly be said the goal is achieved to a greater degree by losing a case, than by winning it.

Few people have any concern about the loser except in the immediate aftermath of the case. In contrast, the loser will endlessly ponder the matter. The process of self-reflection will lead to varying results amongst different individuals. By the time it is completed, the winner and direct supporters of the winner may not even be of faint concern to the loser.

Rather instead, the loser will have progressed to an understanding of the real reasons that gave rise to the loss. Those reasons may not involve specific individuals, but pervasive systemic injustices effectuated by organizations and policies. With proper preparation, it is at that point a well-coordinated and planned legal counterattack is then launched. Not for personal gain or vindication. But instead, to help other totally unrelated individuals, who neither the loser or winner of the original litigation ever even met. Those unrelated people then become the beneficiaries of fairness and justice.

So, it can fairly be said that individual, particularized litigations do not by themselves give rise to winners or losers at all regardless of the result. Losers win certain things, and winners lose certain things. The extent of such is predicated upon how they each conduct themselves after the case.

Ultimately, the only real winners may be people who we don't even know, but who are helped by us, due to our sensitized concern for them. They become the winners because they receive fair and impartial adjudications in other cases. We become winners by being better people who helped strangers. The loss of an individual litigation if addressed properly can potentially give rise to profound human development for the ostensible loser. In contrast, the winner typically wins nothing more than the immediate outcome of the case.

It is specifically and precisely for these reasons that it can be said in all fairness, GOD shines his brightest light on the losing litigant.